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THE INFLUENCE OF JURIDICAL CANT ON EDIFICATORY APPROACHES IN 21ST-CENTURY AMERICA

David Pozen

THE “DISJUNCTION BETWEEN legal education and the legal profession”¹ has widened into a gaping chasm. Law review pages are increasingly filled with statistical regressions, analyses of things that happen in foreign countries, and other matters of no relevance to the bench or bar. Law school classes are taught by PhDs who are illiterate in legal doctrine yet despise the four cases they have read. Law professors prefer “to soar into outer space”² rather than furnish terrestrially grounded research assistance for judges. Thousands of federal court rulings are published (or not³) and then never cited by a single academic paper.

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¹ Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

² Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008) (“[T]here is evidence that law review articles have left terra firma to soar into outer space.”); see also Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 (describing a public event at which Second Circuit “judges pleaded with the law professors to write about actual cases and doctrines”).

³ See Erica S. Weisgerber, Note, *Unpublished Opinions: A Convenient Means to an Unconstitu-*

All of which raises a serious concern: Are judicial opinions becoming irrelevant?

The signs are everywhere, if one has the courage to look. Just consider the *Harvard Law Review's* annual issue on the Supreme Court. In past decades, the Supreme Court Forewords actually concentrated on Supreme Court cases. In recent years, however, the Court hasn't even done enough meaningful legal work to sustain a single article, forcing authors to turn their sights to such esoteric topics as "motivated cognition,"⁴ "system effects,"⁵ "demosprudence,"⁶ and "federalism."⁷ Adding insult to injury, dedicated sections of that law review now examine not only recent court cases but also recent legislation,⁸ executive opinions,⁹ and UN Security Council resolutions.¹⁰ Recent comic books, one assumes, will be taken up next. The taint by association is palpable.

Or consider what the popular data reveal. An online poll conducted in July of this year found that only 32 percent of Americans can name a Supreme Court case and a Supreme Court Justice, while only 19 percent frequently follow news about the Court¹¹ — a sad decline from the approximately 100-percent levels that must have held in 1952 when Eugene Rostow observed that "the Justices are . . . teachers in a vital national seminar."¹² The Twitter data are even starker. Law professor Lawrence Lessig

tional End, 97 GEO. L.J. 621, 622 (2009) ("Presently, the federal judiciary disposes of more than three-quarters of its cases by unpublished opinions.").

⁴ Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

⁵ Adrian Vermeule, *The Supreme Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009).

⁶ Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

⁷ Heather K. Gerken, *The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

⁸ See, e.g., *Recent Legislation*, 128 HARV. L. REV. 1312 (2015).

⁹ See, e.g., *Recent Executive Opinion*, 128 HARV. L. REV. 2320 (2015).

¹⁰ See, e.g., *Recent Draft Resolution*, 128 HARV. L. REV. 1055 (2015).

¹¹ Penn Schoen Berland, U.S. Supreme Court: Key Findings (July 14, 2015), sites.c-span.org/camerasInTheCourt/pdf/July-SCOTUS-Agenda-071415_multiple-year-tracking.pdf.

¹² Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

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has 355,000 Twitter followers at this writing. The Judge Judy television show has 60,000. The Court itself: zero tweets and zero followers, unless one indulges the dubious assumption that @AngryTextualist4ever is really Justice Scalia.

Finally, consider what young lawyers are saying about their platonic guardians. A survey of my current and former students yields distressing results.¹³ Admittedly, this survey is a fabrication and so does not necessarily provide reliable evidence. Nonetheless, it is worth pondering this “response” from a recent graduate, now in private practice:

Judicial opinions? I try to avoid them. I mean, sure, I have to look at them now and again when doing research for a client. But I would rather be doing doc review or gambling online. Now that you mention it, I can’t really think of any associate in my cohort who is all that excited about judges’ output these days.

As I said, distressing. My current students proved no more positive in their assessments of the state of judging. A first-year JD reflected:

I read whatever you assign. As I assume you know, that includes a bunch of cases. I guess some have interesting facts. Usually, I get more out of the “notes” that come after the cases. Except I find it frustrating when the notes just pose questions without giving any answers. Why are the casebook authors so coy? Hello, your book is a billion pages long. Would it kill you to express a clear view once in a while?! By the way, are our answers here going to be graded?

In sum, it is all too clear that the judicial craft has become unmoored from real-world problems and thus in need of reform. Before we can solve this crisis in our profession, though, we need to comprehend it better. Why has the work of judges grown so distant from the practical concerns of students and scholars?¹⁴

¹³ Cf. Edwards, *supra* note 1, at 41-42 (sharing “the results of a survey that [the author] recently circulated to [his] former law clerks”).

¹⁴ For a brilliant take on this question, brought to my attention after this piece was drafted, see the anonymous post at *Judges: Ask Not What Legal Academics Can Do for You, but What You Can Do for Legal Academia!*, PRAWFSBLAWG (July 12, 2011), prawfsblawg.blogspot.com/2011/07/judges-ask-not-what-legal-academics-can-do-for-you-but-what-you-can-do-for-legal-academia.html. I stand on the shoulders of a snarky, nameless giant.

I hypothesize that four factors are at play. First, judicial case selection. Today's academicians care about issues like the economy, the environment, mass surveillance, drone killings, and wrongful convictions. With limited exceptions, the Supreme Court and the lower federal courts have steered well clear of these issues.¹⁵ Magically, however, all justiciability barriers seem to melt away when a case comes along that strikes the Justices' intellectual fancy, say a dispute involving passport markings¹⁶ or the ontology of fish.¹⁷

Second, judicial ideology. It used to be clear to even the most hardened realist that the Court was "the forum of principle."¹⁸ Yet as Jeffrey Rosen has noted, "Ever since *Bush v. Gore*, we've come to expect that federal courts will divide along predictable ideological lines," which in turn track partisan lines.¹⁹ While this trend should be commended for bringing judicial practice in closer sync with academic norms,²⁰ it may weaken incentives for doctrinal scholarship. Why prepare elaborate studies of legalistic questions if they will be decided in any event on political grounds?

Third, judicial interdisciplinarity. Let's be honest: Presidents do not select judges because they have expertise in some highfalutin discipline but instead simply try to choose "the best qualified" lawyer around.²¹ When

¹⁵ See Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court's Agenda — and the Nation's*, 120 HARV. L. REV. 4, 11-12 (2006) (demonstrating that the Court "operates overwhelmingly in areas of low public salience" and is not "deeply involved in what the [American] people believe to be their most important problems"); see also, e.g., Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (dismissing a challenge to warrantless mass surveillance for lack of standing); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing a challenge to drone strikes on standing and political question grounds); Herrera v. Collins, 506 U.S. 390, 400 (1993) (rejecting "actual innocence based on newly discovered evidence" as "a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding").

¹⁶ Zivotofsky v. Kerry, 135 S. Ct. 2076 (2015).

¹⁷ Yates v. United States, 135 S. Ct. 1074 (2015).

¹⁸ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

¹⁹ Jeffrey Rosen, *No Objection*, NEW REPUBLIC, Dec. 15, 2011, at 5. See generally LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES* 77-85 (2013) (reviewing the empirical literature on "judicial ideology" and judicial behavior).

²⁰ See Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. (forthcoming 2015).

²¹ *The Supreme Court; Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2,

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judges produce ambitious forms of social-scientific speculation,²² philosophical inquiry,²³ or historical reconstruction,²⁴ it is therefore not always apparent why they are well suited to do so – or why students and scholars ought to find the work useful. The Warren Court Justices, in contrast, were such meticulous lawyers that they had no need to consult any sources other than their own precedents and intuitions to discern the Constitution's meaning.

Fourth, judicial infighting. Students and scholars, being pragmatic people, try to avoid getting mired in petty squabbling so that they can focus on the pressing legal and social problems of the day. Accordingly, when contemporary Justices describe their colleagues' rulings as "as 'nothing short of ludicrous[,] 'beyond the absurd,' 'entirely irrational,' . . . not 'pass[ing] the most gullible scrutiny,'"²⁵ and the kind of thing that makes you want to "hide [your] head in a bag,"²⁶ the effect is to alienate the law school crowd. And also to distract us with the inevitable questions about paper versus plastic, eye holes or no eye holes, whether Justice Ginsburg would draw a frowny face on the bag, and so forth.

Mix up all of these factors, and I fear we have a toxic brew that threatens the continued relevance of the courts. What can be done? In the best tradition of legal scholarship, I now turn to prescriptions to solve this dilemma.

As an initial matter, it would help if judges started deciding a larger number of important cases in a less political, less interdisciplinary, and less fractious manner. These proposals follow closely from my diagnosis of the problem.

In addition, it would help if judges started hitting the road more often, getting themselves out of their marble monasteries and into the real

1991, at A14 (quoting President George H.W. Bush).

²² See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." (citation omitted)).

²³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (theorizing "liberty of the person both in its spatial and more transcendent dimensions").

²⁴ See, e.g., *District of Columbia v. Heller*, 554 U.S. 570 *passim* (2008).

²⁵ Erwin Chemerinsky, *A Failure to Communicate*, 2012 BYU L. REV. 1705, 1715 (quoting Justice Scalia).

²⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting).

world. For instance, a stray public remark by Chief Justice Roberts has already sparked exciting new research into “the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria.”²⁷ The Chief Justice’s gutting of the Voting Rights Act, by comparison, has yielded little evident benefit for legal theory or pedagogy.²⁸

If we are truly to close the gap between the judiciary and the academy, however, neo-Kantian historiography may not be enough. No one doubts that any law professor in the country could, in his own estimation, competently argue a case before the Court. But how many Article III appointees could hack it in the most critically engaged and civic-minded institutions elsewhere in our legal system? Big problems require bold solutions. Is it time we started asking judges to attend faculty workshops?



²⁷ Chief Justice John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference, www.c-span.org/video/?300203-1/conversation-chief-justice-roberts (June 25, 2011) (“Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”). The leading work in this burgeoning field is Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2D 251 (2015).

²⁸ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Although to be fair, the whole “equal footing” thing was pretty creative. Cf. Zachary S. Price, *NAMUDNO’s Non-Existent Principle of State Equality*, 88 N.Y.U. L. REV. ONLINE 24, 24 (2013) (“The suggestion that federal legislation must treat states equally is a chimera, without support in constitutional text, history, or precedent.”). Within the courtroom, another promising model for closing the judiciary-academy gap is offered by Justice Thomas’s seriatim attacks on the legitimacy of the administrative state, see Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. F. 94 (2015), insofar as they supply an illuminating reductio of Philip Hamburger’s scholarship. See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014).